

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA**

Docket No. 2017-292-WS

IN RE: Application of Carolina Water Service, Inc. for Adjustment of Rates and Charges and Modification to Certain Terms and Conditions for the Provision of Water and Sewer Service)))))))	MOTION TO DISMISS
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TO: Frank R. Ellerbe, III, Esq., Samuel J. Wellborn, Esq., Charles L.A. Terreni, Esq., Scott Elliott, Esq. and John M. Hoefer, Esquire, all of whom are Counsel for the Applicant, Carolina Water Service, Inc.:

The Office of Regulatory Staff (“ORS”) hereby moves before the South Carolina Public Service Commission (“Commission”) to Dismiss the Petition for Rehearing or Reconsideration (“Petition”) filed by the Applicant Carolina Water Service (“CWS” or “Company”) on February 14, 2019 in the above captioned matter.

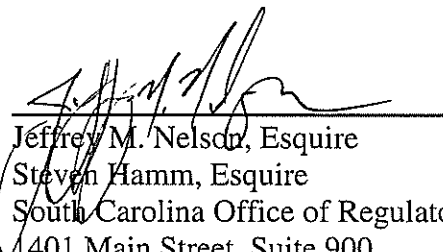
ORS’ Motion is based on CWS having filed a Notice of Appeal of Commission Order No. 2018-802 with the South Carolina Supreme Court on February 25, 2019. In accordance with South Carolina Appellate Court Rule 205 “[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.” CWS has filed a Notice of Appeal with the South Carolina Supreme Court and jurisdiction over this case now rests with that Court. The Commission lacks

the proper jurisdiction to entertain the Company Petition for Rehearing or Reconsideration. Until the appeal before the Supreme Court is disposed of, the Commission's lack of jurisdiction over this case dictates that the Petition must be dismissed.

Additionally, ORS believes that Order No. 2018-802 is the Final Order of the Commission in this docket. For the Commission to permit, and rule on, an infinite number of Motions for Reconsideration creates the possibility of an endless series of requests for reconsideration of the Commission's latest order. The Commission has now held two full evidentiary hearings in this docket and issued two Final Orders. If the company disagrees with Commission Order 2018-802 the proper forum to express that disagreement is now with the South Carolina Supreme Court.

In conclusion, ORS prays that the Commission Dismiss the Company Motion for Reconsideration of Order No. 2018-802 based on lack of jurisdiction.

Respectfully submitted and dated this 27th day of February 2019.



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Attorneys for the SC Office of Regulatory Staff

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2017-292-WS

In Re:)	
)	
Application of Carolina Water Service,)	RESPONSE TO ORS
Inc. for Approval of an Increase in its)	MOTION TO DISMISS
Rates for Water and Sewer Services)	PETITION FOR REHEARING AND
)	RECONSIDERATION
)	
)	

Carolina Water Service, Inc. (“CWS” or “Company”)¹, pursuant to S.C. Code Ann. Regs. 103-829(A) submits its response to the Office of Regulatory Staff’s (“ORS”) Motion to Dismiss (“Motion”) the CWS Petition for Rehearing or Reconsideration (“Petition”) filed on February 14, 2019. The ORS Motion should be denied for several reasons: (1) the argument that CWS’s Petition is not permitted is at odds with the plain language of S.C. Code Ann. §58-5-330; (2) the jurisdictional argument conflicts with recent Supreme Court precedent; and (3) the ORS argument about “successive motions” is contrary to South Carolina cases applying Rule 59(e) SCRCP. For these reasons, as explained more fully below, the ORS Motion should be denied.

BACKGROUND

This proceeding was initiated when CWS filed an application for a rate increase in November 2017. Following an evidentiary hearing in April 2018 the South Carolina Public Service Commission (“Commission”) issued Order No. 2018-345(A) granting a portion of the rate increases sought by CWS. In June 2018 ORS filed a petition for rehearing or reconsideration asking that the Commission reconsider six specific issues ruled on in Order No. 2018-345(A). In

¹ CWS has recently changed its name to Blue Granite Water Company (See Docket No. 2018-365-WS), but to avoid confusion will continue to use its former name for purposes of this proceeding.

response to the ORS petition for reconsideration, the Commission issued Order No. 2018-494 granting rehearing on four of the six issues raised by ORS, including the litigation expense issue which is the subject of the CWS Petition. Following the rehearing, the Commission issued Order No. 2018-802. Among other rulings, Order No. 2018-802 ruled on recovery of litigation expenses differently from the ruling on that issue in Order No. 2018-345(A). CWS filed its Petition seeking rehearing and reconsideration of the ruling on recovery of litigation expenses.

On February 25, 2019 CWS filed a notice of appeal of Order No. 2018-802 with the South Carolina Supreme Court. In its cover letter with the notice CWS explained that it had filed a petition for rehearing and reconsideration and was filing the notice of appeal because of uncertainty as to whether its Petition would toll the time for appeal.² See Exhibit 1. The ORS Motion requests dismissal of the Petition on the grounds that it is not permitted because it follows a previous order granting rehearing and because the notice of appeal divested the Commission of jurisdiction.

Argument

1. The ORS Motion is at Odds with the Plain Language of S.C. Code Ann. §58-5-330.

S.C. Code Ann. §58-5-330 provides for rehearing of matters decided by the Commission in water and sewer cases.

Within twenty days after an order or decision is made by the commission, any party to the action or proceeding may apply for a rehearing as to any matter determined in the action or proceeding and specified in the application for rehearing and a rehearing must be granted if in the judgment of the commission sufficient reason exists. No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person unless the corporation or person makes application to the commission for a rehearing within the time specified. The application must set forth specifically the ground on which the applicant considers the decision or order to be unlawful. The determination must be made by the commission within thirty days after it is finally submitted. If, after the hearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision, or any part of it, is in any respect unjust or unwarranted or should be changed, the

² CWS intends to file a motion with the Supreme Court requesting that its appeal be held in abeyance pending the Commission's ruling on the Petition.

commission may abrogate, change or modify it and, if changed or modified, the modified order must be substituted in the place of the order originally entered and with like force and effect.

There is no qualification in this provision as to what orders or decisions are covered and the language is very clear that there is no right to appeal an order of the Commission unless the party seeking the appeal has first asked the Commission for a rehearing and explained the basis for the request. The ORS Motion asks the Commission to rewrite this statutory provision to limit the circumstances under which a party must ask for rehearing or reconsideration. The Commission has only the authority granted to it by the General Assembly and that grant does not include the power to rewrite statutory provisions. *South Carolina Cable Televisions Assn. v. Public Service Commission*, 313 S.C. 48, 437 S.E.2d 38 (1993).

There is another provision of S.C. Code Ann. §58-5-330 that demonstrates that the ORS argument is incorrect. Section 58-5-330 expressly allows the consideration of matters “arising since the making of the order or decision...” In its Petition CWS cited this provision as authority for one of its grounds supporting its Petition. See Petition, pp. 2, 8. The ORS position that CWS has no right to request rehearing and reconsideration under the circumstances of this proceeding would nullify the statutory provision that allows CWS to base its Petition on matters arising since the hearing in September 2018. This is another reason that the Commission should reject the ORS interpretation of S.C. Code Ann. §58-5-330.

2. The ORS Jurisdictional Argument Conflicts with Recent Precedent.

In its Motion ORS argues that the CWS notice of appeal divests the Commission of jurisdiction over the Petition. The situation presented by the combination of the CWS Petition and Notice of Appeal was also presented in the appeal by the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (“CCL/SACE”) of orders in Docket 2018-2-E. In that case CCL/SACE filed a notice of appeal after the issuance of a directive denying a petition

for reconsideration but before a formal order was issued. The respondent, South Carolina Electric & Gas, filed a motion with the Supreme Court to dismiss the appeal or alternatively to hold it in abeyance pending a final ruling by the Commission. The Court issued an order denying the motion to dismiss but granting the request to hold the appeal in abeyance. See Order dated August 16, 2018 in Appellate Case no. 2018-001165 (Attached as Exhibit 2).

The quandary faced by CCL/SACE with respect to Docket No. 2018-2-E (and described in a letter to the Commission attached as Exhibit 3) is similar to that faced by CWS in this proceeding: failure to file a timely notice of appeal is jurisdictionally fatal to the appeal but so is failure to file a petition for rehearing or reconsideration. In the CCL/SACE appeal the Supreme Court resolved the dilemma by accepting a notice of appeal and holding it in abeyance while allowing the Commission time to fully address matters for which rehearing or reconsideration was sought. The Court did not hold that the Commission was divested of jurisdiction by the filing of the notice of appeal. The ORS argument to the contrary should be rejected.

3. The ORS Argument that CWS's Petition is a Disallowed "Successive Motion" Is Contrary to South Carolina Cases Applying Rule 59(e) SCRC.

Rule 59(e) SCRC is the civil procedure device for asking a trial court to reconsider its rulings. See *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). In *Elam*, the Court reviewed in detail the question of whether and when successive motions for reconsideration would toll the time for filing a notice of appeal. In that case the Department of Transportation ("DOT") had made a post-trial motion that was denied and then filed a Rule 59(e) motion that repeated the arguments made in the post-trial motion. The Court of Appeals dismissed the DOT appeal as untimely on the ground that the Rule 59(e) motion was a successive motion that did not stay the time for appeal. In its discussion explaining its reversal of the Court of Appeals ruling, the Supreme Court described the importance of allowing lower courts and tribunals a full opportunity to address all issues.

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

Elam, supra, 361 S.C. at 23.

The Court's ruling in *Elam* that the DOT motion for reconsideration should be allowed stressed the importance of allowing a full treatment of issues prior to appellate review. The ORS motion takes a directly contrary position. The CWS Petition is the first time that it has had an opportunity to ask the Commission to reconsider its rulings in Order No. 2018-802. The strong preference expressed in *Elam* for lower courts and tribunals to have a full opportunity to address issues before appeal requires that the Commission deny the ORS Motion and proceed with consideration of the CWS Petition.

Conclusion

The ORS Motion is contrary to the statute that provides for rehearing and reconsideration, the Supreme Court's treatment of a recent similar appeal from the Commission and the Court's treatment of requests for reconsideration in circuit court. The CWS Petition is CWS's first opportunity to ask the Commission to reconsider its rulings in Order No. 2018-802. Both CWS and the Commission deserve an opportunity to have the issues fully addressed. Accordingly, the ORS Motion should be denied.

Dated this 5th day of March 2019.

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[Signatures continue on next page]

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and

s/Frank R. Ellerbe, III
Frank R. Ellerbe, III
Samuel J. Wellborn
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Attorneys for Carolina Water Service, Inc.



ROBINSON
GRAY

Litigation + Business

Exhibit 1

FRANK R. ELLERBE, III

DIRECT 803 227.1112 DIRECT FAX 803 744.1556

fellerbe@robinsongray.com

February 25, 2019

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

**Re: Carolina Water Service, Inc. for Approval of an Increase in its Rates for
Water and Sewer Services - Docket No. 2017-292-WS**

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal and Certificate of Service in the above matter. A check in payment of the \$100 filing fee is also enclosed.

This Appeal is being filed with the Supreme Court pursuant to Rule 203(d)(2). On January 25, 2019, Carolina Water Service, Inc. ("CWS") filed a Petition for Rehearing and Reconsideration ("Petition") of Order No. 2018-802 with the South Carolina Public Service Commission. The Petition was filed pursuant to S.C. Code Ann. §58-5-330. Ordinarily our notice of appeal would not be ripe until the Commission ruled on the Petition. However, in this case Order No. 2018-802 was a ruling arising from a previous petition for rehearing filed by another party. Because of uncertainty as to whether successive petitions for rehearing toll the time for filing a notice of appeal, CWS is filing this notice of appeal today.

Please stamp the extra copy provided and return it with our courier. Should you have any questions, please contact me.

Yours truly,

Frank R. Ellerbe, III

FRE:tch

Enclosures

cc: Public Service Commission of South Carolina (via electronic filing)
Parties of Record in Docket No. 2017-292-WS

The Supreme Court of South Carolina

South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy, Appellants,

v.

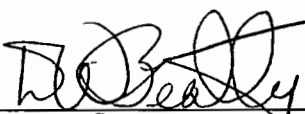


South Carolina Public Service Commission, South
Carolina Electric & Gas, CMC Steel South Carolina,
South Carolina Energy Users Committee, South Carolina
Solar Business Alliance, LLC, Southern Current, LLC
and South Carolina Office of Regulatory Staff,
Respondents.


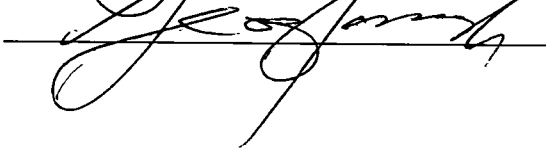
Appellate Case No. 2018-001165

ORDER

Respondent South Carolina Electric & Gas moves for the dismissal of appellants' notice of appeal or, in the alternative, to hold the notice of appeal in abeyance. Appellants oppose the motion to dismiss, but concur with the request to hold the appeal in abeyance pending the anticipated order from the Public Service Commission on the petition(s) for rehearing. The motion to dismiss is denied, but the request to hold the appeal in abeyance is granted, with the right to amend the notice of appeal if necessary following the issuance of the Commission's order. This includes the timelines for briefing pursuant to the South Carolina Appellate Court Rules.

IT IS SO ORDERED.

 C. J.
 J.
 J.


J.

J.

Columbia, South Carolina

August 16, 2018

cc:

James Blanding Holman, IV, Esquire

Andrew McClendon Bateman, Esquire

Jenny Rebecca Pittman, Esquire

Alexander George Shissias, Esquire

Timothy F. Rogers, Esquire

Richard Lee Whitt, Esquire

Benjamin Parker Mustian, Esquire

K. Chad Burgess, Esquire

Matthew William Gissendanner, Esquire

Scott A. Elliott, Esquire

Jocelyn Boyd, Esquire

Fred David Butler, Esquire

Mitchell Willoughby, Esquire

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

463 KING STREET, SUITE B
CHARLESTON, SC 29403-7204

Facsimile 843-414-7039

June 29, 2018

Via Electronic Filing and E-mail

F. David Butler, Esq.
Hearing Officer
Public Service Commission of South Carolina
101 Executive Center Drive
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David.Butler@psc.sc.gov

**Re: Annual Review of Base Rates for Fuel Costs for South Carolina Electric
Gas Company; Docket No. 2018-2-E
Appellate Case No. 2018-001165**

Dear Mr. Butler:

Thank you for your email clarifying that the Public Service Commission of South Carolina will issue a more full and complete order on rehearing and reconsideration in the 2018 Annual Review of Base Rates for Fuel Costs for South Carolina Electric & Gas Company ("SCE&G"), Commission Docket No. 2018-2-E. We thought it would be helpful to share our clients' position on the timing of the notice of appeal and flag this as a procedural issue that may be worth bringing to the attention of the Commission for future proceedings.

South Carolina Appellate Court Rule 203 requires that all notices of appeal from administrative tribunals must be served within thirty days of receipt of the decision granting or denying any timely petition for rehearing. S.C. App. Ct. R. 203(b)(6). The only instance where this deadline can be extended is where "*a decision indicates* that a more full and complete decision is to follow." *Id.* (emphasis added). In that case, a party "*need not* appeal until receipt of the more complete decision[.]" *Id.* (emphasis added).

Because the May 23 directive in this proceeding did not expressly indicate that a more full and complete decision would follow, Conservation Groups filed their notice of appeal within thirty days from that directive, in order to fully protect their right to appeal.¹ Significantly, the requirement of service of the notice of appeal is jurisdictional. If a party misses the deadline, the appellate court "has no authority or discretion to rescue the delinquent party by extending or ignoring the deadline for service of the notice."

¹ The Conservation Groups appreciate the email clarification regarding the more full and complete order, but note that Appellate Court Rule 203 specifically references the administrative tribunal's "decision." To protect their right to appeal, Conservation Groups relied specifically on the language in the Commission's decision (the directive).

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (citations omitted). This heightens the importance of a timely filed notice of appeal.

Appellate Rule 203 includes language permitting an earlier filing (the parties “*need not* appeal until receipt of the more complete decision”). However, it would still be helpful for parties considering appeal and those responding to such an appeal if the Commission were to provide a clear signal in future directives addressing petitions for rehearing or reconsideration when a more full and complete order is forthcoming. The following phrasing would mirror the language that tolls the appeal deadline in Appellate Rule 203: “A more full and complete order will follow this directive.”

Although it may be possible to infer from the Commission’s directives when a more full and complete order is forthcoming (as suggested by SCE&G in this proceeding), relying on this inference puts the appealing party at risk of an adverse interpretation on appeal. If a directive is misconstrued and the appellate deadline missed, the consequences are severe for the party wishing to appeal.

By copy of this letter, we are serving other parties of record. Thank you for your time and consideration of this matter.

Respectfully submitted this 29th day of June, 2018.

s/ J. Blanding Holman, IV
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Attorneys for Conservation Groups

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2018-2-E

In the Matter of:

Annual Review of Base Rates for
Fuel Costs for South Carolina
Electric & Gas Company

CERTIFICATE OF SERVICE

I hereby certify that the following persons have been served with this letter by electronic mail and/or U.S. First Class Mail at the addresses set forth below:

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**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE**

ADMINISTRATIVE MATTER

☐

DATE

March 07, 2019

MOTOR CARRIER MATTER

☐

DOCKET NO.

2017-292-WS

UTILITIES MATTER

☒

ORDER NO.

2019-178

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

SUBJECT:

DOCKET NO. 2017-292-WS - Application of Carolina Water Service, Incorporated for Approval of an Increase in Its Rates for Water and Sewer Services - Staff Presents for Commission Consideration the Office of Regulatory Staff's Motion to Dismiss Carolina Water Service, Incorporated's Petition for Rehearing and Reconsideration of Commission Order No. 2018-802.

COMMISSION ACTION:

As you recall from a reading of the record, Carolina Water Service filed a Notice of Appeal of this Commission's Order No. 2018-802 with the Supreme Court of South Carolina on February 25, 2019.

We have looked at the South Carolina Appellate Court Rules, and Rule 205 reads, in pertinent part, "Upon the service of the Notice of Appeal, the Appellate Court shall have exclusive jurisdiction over the appeal."

Since Carolina Water Service filed a Notice of Appeal with the Supreme Court of South Carolina, jurisdiction over this case now rests with the Supreme Court. Therefore, this Commission lacks jurisdiction to entertain the company's Petition for Rehearing or the company's Petition for Reconsideration.

For these reasons, I move that the Motion for Rehearing and Reconsideration filed by CWS on February 14, 2019, be dismissed for lack of jurisdiction. I also move that the directive recording this Commission's vote today shall constitute the Commission's Order in this matter.

So moved.

PRESIDING: RandallSESSION: Regular

TIME: 2:00 p.m.

	MOTION	YES	NO	OTHER
BELSER	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<u>Recused</u>
ERVIN	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
HAMILTON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
HOWARD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
RANDALL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WHITFIELD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WILLIAMS	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

RECORDED BY: J. Schmieding

(SEAL)

